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Bart Lubow

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Symposium: Justice for the Child

Prepared Keynote Address: Minimizing Youth Incarceration: A Civilizing Aspiration?*

Bart Lubow**

¶1 It is a particular honor to speak at this Children and Family Justice Center symposium because I so admire the Center's unique combination of policy advocacy and innovative practice. My experience tells me that neither policy advocacy, nor determined, persistent championing of the rights of children in individual cases, are sufficient in its own right to change the rotten outcomes that far too many kids face. Both are needed, but rarely have they been combined as effectively as with the Center's work. So, thank you for the honor of this time today.

¶2 I need to take a moment, also, to express my personal admiration and love for Bernardine [Dohrn], for her contributions to the cause of justice for children and families and for this wonderful Center that was her inspiration and her work for the past two decades.

¶3 One of the great privileges of working for a national foundation is that you are often called upon for speeches and comments. As a number of you know, I give lots of presentations, but they are almost exclusively addressed to juvenile justice officials and practitioners or to advocates and community members. I can think of only a few speeches that I have given in recent years in a university context, and I can remember only once actually publishing my pleadings in an academic journal in the past two decades. Consequently, I have struggled recently to find a suitably and authentically scholarly frame for my comments today.

¶4 Dostoyevsky evidently claimed that society's degree of civilization, or lack thereof, could be determined by its prisons. (How is that for a scholarly beginning?) I am paraphrasing, I'm sure, because I don't actually recollect reading this in anything by Dostoyevsky. I am familiar with the assertion, however, because it appeared for years on the masthead of *Fortune News*, a scruffy, intermittent publication of that venerable prisoner self-help organization in New York City, the Fortune Society. Today, I beg to differ with Dostoyevsky.

¶5 It seems to me that any comprehensive, careful examination of the history of imprisonment makes it clear that the practice of putting people in cages—especially children—marks us, and virtually all societies, as brutal and inhumane.

¶6 Of course, the modern corrections system is somewhat less arbitrary, less violent, less unhealthy, and perhaps even less neglectful of some basic human rights than was true

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** Director, Juvenile Justice Strategy Group, The Annie E. Casey Foundation.

historically. And certainly wealthier, more technologically advanced countries tend to have spiffier facilities, with better paid (though not necessarily more decent) staff, and they probably provide inmates with diets of greater caloric content. But I think we must acknowledge that these improvements reflect differences of a relatively minor degree, at least if we are judging how civilized we are. Fundamentally, all correctional institutions have been—and continue to be—fearful, degrading places of arbitrary control, places unnatural and unhelpful to the human condition, except perhaps insofar as they are contexts that give license to some of our most base and vile instincts: to cruelty, to punishment, to the wanton exercise of power over those without it. People wondered a few years ago how the abuses of Abu Ghraib could have occurred. Any honest historian of imprisonment would have asked: “What else could we have reasonably expected?”

¶7 To the extent that there are any judgments to be made about societies and civilizations using Dostoyevsky’s measuring stick, I suggest that his scale of relative humanity is really far too narrow to be particularly worthwhile. If we are limited to distinguishing the quality of a society by its prisons, we are reduced largely to comparing amenities. As a young man, within a period of four months, I was locked up, first in an overcrowded county jail in suburban New Jersey, where I slept on a blanket on the floor and had soggy cornflakes and watered-down coffee for breakfast, and then in a municipal jail in a U.S. Navy base town in the rural Philippines—equally crowded, again without a mattress, where breakfast was a baggie full of rice and, again, some watered-down coffee. The primary difference in the facilities was that the urinal in New Jersey was ceramic, while the urinal in the Philippines was a hole in the floor. The fundamentals were basically the same, and my feelings of powerlessness and fear were identical. Certainly New Jersey did not rate any higher on my “civilization scale” based upon the ceramic urinal.

¶8 My point is not that the conditions in youth or adult prisons don’t matter—of course they do. And since I find it hard to imagine that we will evolve quickly enough to see a world without any confinement whatsoever, we should always prefer more amenities to fewer, and better conditions to worse. We should always—in any justice system reform—endeavor aggressively to pursue more humane, healthy, normalized, and enriched circumstances for those who are locked up. I just don’t think we should delude ourselves into thinking that those improvements make us much more civilized. I will always be skeptical that improvements to conditions in a fundamentally inhumane context render us much more civilized than the next state or country or continent.

¶9 Let’s consider the juvenile corrections experience as a relevant case in point. If ever there was a correctional context in which a higher degree of civilization ought to manifest itself, surely it ought to be when we lock up children. But the history of youth corrections in this country is so bad—so rife with sordid scandal, persistent abuse, and unfulfilled promises of remediation—as to strongly imply, if not definitively prove, that we do not know how to operate humane and safe, much less rehabilitative and secure, facilities for juveniles. Judging by history and present circumstances, the term “good youth corrections center” is simply an oxymoron. What other conclusion is reasonable in light of the deaths; the sexual violence; the broken bones; the wholesale use of mechanical and chemical restraints; and the periods of prolonged isolation?

¶10 Yes, we have the Missouri Model¹ and, as someone long involved in both its evolution and its popularization, I would pray—if I were a praying person—that all juvenile facilities be transformed into Missouri-style institutions immediately. But I fear that Missouri’s far better approach to juvenile corrections—and it is far better—is simply the exception that proves the rule. Whether it can be replicated in this nation’s poisoned policy environment, much less at significant scale, remains yet to be demonstrated. Moreover, I equally fear that Missouri-like facilities in more places may simply provide additional excuses for the policies and practices of unnecessarily and inappropriately removing children from their families and communities.

¶11 So, I think we should discard Dostoyevsky’s measure of civilization and replace it with an alternative. What might that be? Let me suggest—if we are going to hang onto something related to incarceration as our main criterion for our degree of civilization—that a far better measure by which to distinguish societies, and to promote social progress, would be our imprisonment *policies*. That is, we should judge our civilization, and our humanity, by our degree of reliance on prisons and jails, not by the amenities of the facilities. By that criterion, of course, the United States fails the test of civilization miserably.

¶12 Over the past forty years, we have essentially quintupled our imprisonment rate. Today, we have 2.3 million people in cages. We lock folks up at a rate higher than any other country, despite our vain protestations of being the land of the free. And when we compute these rates by race and ethnicity, the real magnitude of our inhumanity and injustice are truly revealed.

¶13 Neither our incarceration policies nor our incarceration rates are driven primarily by public safety concerns or actual crime levels. Indeed, crime goes up and it goes down in America; the prison industry just keeps on growing. Why? Imprisonment policies function nowadays to maintain the social caste system that keeps people of color disadvantaged and to provide profits and jobs. Put another way, two great determinants of U.S. history, racism and profit, translate to an American imprisonment policy of mass incarceration. It is the policy of three-strikes-you’re-out; the policy of life without parole; the policy of fifteen-to-life for two ounces of dope (as under the New York State Rockefeller drug laws); the policy of so-called “truth in sentencing” (a cover for extended sentences); the policy of parole abolition and work release elimination; and, of course, the policy of juvenile transfer or waiver. It is the policy of a nation addicted to incarceration and, I am sad to say, of a populace insensitive and indifferent to its consequences.

¶14 The incarceration of juveniles serves as a uniquely strong example of the United States’ failure to pass this revised civilization test. Juvenile courts remove some 150,000 youth from their homes annually, not counting those admitted for pre-adjudication detention, placing the majority in correctional facilities that we euphemistically call “training schools” or “youth development centers.” In reality, these places are correctional facilities cloaked in the bittersweet euphemisms of our juvenile justice system. Only about one quarter of these youth have committed acts of violence; far more

¹ RICHARD A. MENDEL, *THE MISSOURI MODEL: REINVENTING THE PRACTICE OF REHABILITATING YOUTHFUL OFFENDERS* (2010), http://www.aecf.org/~media/Pubs/Initiatives/Juvenile%20Detention%20Alternatives%20Initiative/MOmodel/MO_Fullreport_webfinal.pdf.

are locked up because they have so frustrated or angered an adult, for whom incarceration was an available option, that those with power (the people who operate the system) acted out against the powerless (typically, disadvantaged youth of color). Incarceration policy allows this to happen: We simply do not sufficiently restrict the power of judges or prosecutors, or even probation officers, for that matter, to limit these practices in most places. The evidence of the impact of these open-ended incarceration policies has become very clear in juvenile justice in recent years. When states like California², Texas³, and Alabama⁴ changed their laws to restrict more vigorously which youth might be committed to state custody by local courts, their juvenile corrections populations dropped precipitously, and of course, civilization as we know it did not end.

¶15 Because we are frequently unable to justify the incarceration of these tens of thousands of youngsters by claiming they jeopardize our safety, we defend these practices by noting that these youth have high rates of mental health problems, high rates of educational disabilities, dysfunctional families, and numerous other disadvantages, many of which are real, but as if incarceration is a proper or reasonable response to the needs of children. And, for those who argue that we do not have the funds to respond to those needs in more appropriate contexts, let's remember that the average annual cost of operating a single youth corrections bed exceeds the cost of sending a student through law school.⁵

¶16 What we need to do, therefore, if we want to raise the level of civilization, is to reduce our reliance on incarceration dramatically, not merely improve conditions of confinement. For too long, however, our response to the inappropriate and unnecessary incarceration of both children and adults has been equivocal, if not apologetic, in tone, and incremental in approach. It has involved tinkering with the technologies of corrections population management and the marginal introduction of programmatic solutions, rather than fundamental policy reform that boldly restricts incarceration.

¶17 There is much to be said for re-engineering juvenile and adult justice to reduce incarceration, as we try to do, for example, in the Juvenile Detention Alternatives Initiative (JDAI). Indeed, the urgency of keeping youth out of detention centers and corrections facilities demands that we do anything and everything to reduce reliance on secure confinement at every opportunity. JDAI sites have reduced secure detention

² MIKE MALES & DANIEL MACALLAIR, CTR. ON JUVENILE & CRIMINAL JUSTICE, *THE CALIFORNIA MIRACLE: DRASTICALLY REDUCED YOUTH INCARCERATION, DRASTICALLY REDUCED YOUTH CRIME* (2010), www.cjcj.org/files/The_California_Miracle.pdf.

³ Todd Richmond, *States Closing Youth Prisons as Arrests Plunge*, ASSOCIATED PRESS, June 6, 2010; *TYC Population Trends*, TEX. YOUTH COMM'N, http://www.tyc.state.tx.us/research/growth_charts.html; *Crime in Texas*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/administration/crime_records/pages/crimestatistics.htm.

⁴ Sue Bell Cobb, Chief Justice, Address to the Alabama Legislature: State of the Judiciary (Feb. 10, 2009).

⁵ In the state with the most expensive youth correction system this cost exceeds \$250,000. See JUSTICE POLICY INST., *THE COSTS OF CONFINEMENT: WHY GOOD JUVENILE JUSTICE POLICIES MAKE GOOD FISCAL SENSE* (2009),

http://www.justicepolicy.org/images/upload/09_05_REP_CostsofConfinement_JJ_PS.pdf. Three years of tuition in the J.D. program at Northwestern University School of Law, using the 2010–2011 tuition, is approximately \$150,000. *Tuition Rates and Expenses*, NW. U. SCH. L.,

<http://www.law.northwestern.edu/admissions/tuitionaid/tuition/>. See generally COLL. BD. ADVOCACY & POLICY CTR., *TRENDS IN COLLEGE PRICING 2010*,

http://trends.collegeboard.org/downloads/College_Pricing_2010.pdf.

populations, on average, by approximately one third, and they have reduced commitments by almost one quarter. These results are certainly noteworthy and make a huge difference to the thousands of youth who avoided detention or commitment because of JDAI-type reforms. But the real, enduring value of initiatives like JDAI is that they “operationalize” an overall policy reform agenda, in this instance, eliminating unnecessary or inappropriate use of detention. Reform efforts like JDAI help retrain system personnel from the daily habits that collectively constitute the status quo. But JDAI-type strategies, absent an overarching policy reform ambition, might otherwise amount to incremental change insufficient to alter patterns of the mass incarceration of children.

¶18 The policies of mass incarceration in the United States must be attacked on a policy level. As Michelle Alexander argues in her new book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, we need a movement analogous to the Civil Rights Movement to change state and federal laws to restrict the use of confinement. We need to change perverse funding incentives that encourage local courts to put people in state facilities. We need to end three strikes, life without parole, juvenile transfer, and all the rest of those “lock ’em up” statutes that were passed in the past few decades. We need to provide the accused with stronger advocates to inhibit the inevitable bullying tendencies of the state. And we need to end the permanent disabilities that incarceration policies inflict upon those convicted of crimes, including youth.

¶19 But in waging policy reform campaigns, we must also guard against the predictable tendency to neglect injustice in individual cases and routine systemic practices. Policy change is essential, but as we have seen in projects like JDAI, it is much easier to articulate progressive, even radically different, public policy than it is to implement it. Far too many laws and regulations and rules—supposedly enacted for the welfare of children—have been written but then shabbily or incompletely implemented for us to think that legislation alone is the answer. It isn’t. We can’t work for changes to the policies of mass incarceration and fail to attend to the daily operational details. Complacency about individual cases or daily practice runs the risk of making us complicit with those policies we want to change. Bob Schwartz and his colleagues at Juvenile Law Center, in describing the scandal that rocked Luzerne County, Pennsylvania, where a couple of crooked judges lined their pockets with millions of dollars by denying kids their right to counsel and incarcerating them for minor offenses, point out that a culture of complicity surrounded that system, a culture where virtually every stakeholder, by not vigorously and consistently fighting for the rights and interests of all kids, allowed the grossest of abuses to happen. What happened in Luzerne County happens daily, but without the coarse graft. We need both institutional change and individual change. Everyone must reexamine whether she or he is resolute, all the time, in the struggle for justice for kids. Being against bad policies will not suffice.

¶20 Let me try to summarize my primary message. We may just be at a special moment in history when real change regarding youth justice is possible. I am old enough to be cynical, but aware enough to be encouraged by what I consider to be a unique confluence of conditions. Juvenile crime is way down, providing the ideological space necessary for reasonable debate about incarceration policy. Government budgets, at all levels, are stressed, creating interest in reducing what has become one of the public sector’s largest cost centers. The evidence against juvenile incarceration is

overwhelming, while evidence of what works to help youth succeed is mounting. We have a national movement for juvenile detention reform that provides credibility, leadership, and influence for reducing incarceration. We have seen critical shifts in judicial philosophy regarding youth and their culpability, especially as reflected by U.S. Supreme Court decisions in *Roper*⁶ and *Graham*.⁷

¶21 This may just be one of those unique moments that Bernardine described, and that is why our Foundation has benchmarked our future ambitions regarding juvenile incarceration: to reduce the number of youth incarcerated by at least 50 percent within the next ten years and to discard the training school model of youth corrections within fifteen. We think the terms of this endeavor must be that stark. The option of incarceration must be severely restricted if we really hope to see a more civilized approach to challenging kids.

¶22 But I must reiterate that there is an individual responsibility to represent justice, to fight for court-involved youth as if they were our own, that cannot be trumped by policy reform campaigns or ambitious foundation initiatives. If this is a unique moment of opportunity for juvenile justice reform, it will distinguish itself, as other such moments have, by its infectiousness; by the spread of daily acts of defiance of the system's market rates; and by hourly assaults on the longstanding equilibrium that results in fewer rights, less opportunity, and more punishment, especially for youth of color.

¶23 That is why I love the Children and Family Justice Center. It doesn't just take positions on legislation or recommend reforms, or publish policy advocacy tomes. Rather, it fights daily for kids in court; teaches young lawyers how to be vigorous advocates; refuses to be bound by outdated modes of representation that fail to address the complicated circumstances of today's youth; and persistently, doggedly fights for the rights of each and every child and family it represents. It puts its opposition to the policies of mass incarceration into practice in every case and in every seminar. And in so doing, it helps our society to become more just and, therefore, more civilized. We should all follow its example.

⁶ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷ *Graham v. Florida*, 130 S. Ct. 2011 (2010).